PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARTIN ESCOBAR,
Petitioner,

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Immigration and Nationality Act, a lawful permanent resident who has been "convicted" of an "aggravated felony" is ineligible to seek cancellation of removal. 8 U.S.C. § 1229b(a)(3). The courts of appeals have divided 4-2 on the following question presented by this case:

Whether a person convicted under state law for simple drug possession (a federal law *misdemeanor*) has been "convicted" of an "aggravated *felony*" on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession.

PARTIES TO THE PROCEEDING

Petitioner is Martin Escobar, petitioner below.

Respondent is United States Attorney General Eric H. Holder, Jr., respondent below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The order of the court of appeals is unpublished and reprinted in App. A, *infra*. The orders of the Board of Immigration Appeals are unpublished and reprinted in App. B and App. C, *infra*. The decision of the Immigration Judge is unreported and reprinted in App. D, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2009. App., *infra*, 1a-2a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the appendix. App. E, *infra*, 20a-27a.

STATEMENT OF THE CASE

The court of appeals' decision in this case squarely raises an issue on which there is an acknowledged conflict among the circuits, *viz.*, whether a person convicted under state law for simple drug possession (a federal law *misdemeanor*) has been "convicted" of an "aggravated *felony*" on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession. Two courts of appeals, including the court of appeals below, have

held that an alien has been "convicted" of an "aggravated felony" in that situation. Four courts of appeals have reached the opposite conclusion. The Board of Immigration Appeals (BIA) agrees with the latter courts that an alien convicted of simple possession cannot be considered "convicted" of an "aggravated felony" on the theory that he *could have been* prosecuted as a recidivist possessor, if there in fact was no prosecution as a recidivist and hence no finding by a judge or jury of any valid prior conviction. The issue is a recurring and important one—as the BIA has recognized—because an alien deemed "convicted" of an "aggravated felony" upon a conviction for simple drug possession faces mandatory removal from the country.

1. An alien convicted of an "aggravated felony" faces a number of adverse consequences under the Immigration and Nationality Act (INA). Of particular salience here, an alien subject to removal, if convicted of an aggravated felony, is categorically ineligible to petition the Attorney General for cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3).

The INA defines an "aggravated felony," in pertinent part, as "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. § 1101(a)(43)(B). Section 924(c) in turn defines a "drug trafficking crime" as, *inter alia*, "any felony punishable under the Controlled Substances Act [CSA]." 18 U.S.C. § 924(c)(2). Simple possession of drugs—*i.e.*, possession with no finding of an intent to distribute—ordinarily constitutes only a misdemeanor under the CSA, *see* 21 U.S.C. § 844(a), and thus fails to qualify as an aggravated felony. But in

the case of a defendant with a previous conviction for simple possession, the prosecutor may seek a recidivist sentencing enhancement, in which event the defendant would face a felony sentence of up to two years of imprisonment upon the judge's determination of a valid prior conviction for simple possession. *Id.*; *see* 21 U.S.C. § 851.

In *Lopez v. Gonzales*, 549 U.S. 47 (2006), this Court considered the circumstances in which a state law drug possession offense qualifies as a "drug trafficking crime"—and hence an "aggravated felony"—under the INA. *Lopez* addressed, in particular, whether a possession offense "made a felony under state law but a misdemeanor under the Controlled Substances Act is a 'felony punishable under the Controlled Substances Act,'" and thus is a "drug-trafficking crime" for purposes of the INA's definition of "aggravated felony." *Id.* at 50 (quoting 18 U.S.C. § 924(c)). The Court found it irrelevant whether state law makes possession a felony; what matters instead is whether the state offense "proscribes conduct punishable as a felony under" the CSA. *Id.* at 60. A contrary conclusion, the Court explained, "would often turn simple possession into trafficking," which would be inconsistent "with any commonsense conception of 'illicit trafficking.'" *Id.* at 53-54. Because Lopez's state law simple possession offense would fail to constitute a felony under the CSA, the offense failed to qualify as an "aggravated felony" under the INA. Lopez accordingly retained eligibility to seek cancellation of removal. *See id.* at 52.

2. Petitioner is a native and citizen of Mexico who entered the United States in 1981, and became

a lawful permanent resident in 1990. Certified Administrative Record of Proceedings (C.A.R.) 35, 133-34. Petitioner has worked as a tree trimmer since 1998. C.A.R. 135, 148. Petitioner's wife is a lawful permanent resident with whom he has three children, each of whom is a United States citizen. C.A.R. 35, 136, 140-41.

On July 11, 1997, petitioner pleaded guilty to simple possession of 2.5 to 10 grams of marijuana, a misdemeanor violation of Illinois law, 720 Ill. Comp. Stat. § 550/4(b). App., *infra*, 3a, 8a; C.A.R. 2. He was sentenced to six months of court supervision. App., *infra*, 3a-4a; C.A.R. 151. On March 13, 1998, petitioner pleaded guilty to possession of a controlled substance, App., *infra*, 4a, 8a, which is a felony under Illinois law, 720 Ill. Comp. Stat. § 570/402(c), but a misdemeanor under federal law, *see* 21 U.S.C. § 844(a). The State did not prosecute petitioner under a statute that allows it to seek a recidivist sentencing enhancement when a defendant is convicted of a "second or subsequent offense." 720 Ill. Comp. Stat. § 570/408(a). Instead, petitioner was sentenced to two years of probation. C.A.R. 35; 153-54.

3. Almost eight years after that conviction, the federal government detained petitioner as he was returning to the United States after a brief trip to Mexico, and initiated removal proceedings against him. App., *infra*, 8a; C.A.R. 35. The government sought petitioner's removal under 8 U.S.C. § 1227(a)(2)(A)(i)(II), which provides for removal of an alien who "is convicted of a crime for which a sentence of one year or longer may be imposed." App., *infra*, 7a-8a, 15a; C.A.R. 75-76. Petitioner, appearing before the immigration judge (IJ), applied for

cancellation of removal. App., *infra*, 4a, 15a (C.A.R. 76); *see* 8 U.S.C. § 1229b(a).

On May 1, 2006, the IJ issued an oral decision holding that petitioner was removable on the basis of his conviction for drug possession, and was categorically ineligible for cancellation of removal because that conviction was an "aggravated felony" as defined by 8 U.S.C. § 1101(a)(43)(B). App., *infra*, 15a-19a (C.A.R. 76-78). The IJ reasoned that petitioner's conviction qualified as an aggravated felony because the conviction occurred after petitioner "had previously been convicted of a controlled substance violation," *id.* at 17a-18a (C.A.R. 78), and thus could have subjected him to more than one year of imprisonment under 21 U.S.C. § 844(a) if he had been charged in the federal system and had been treated as a recidivist.

4. On October 13, 2006, the Board of Immigration Appeals (BIA) affirmed, holding that petitioner had been convicted of an aggravated felony "drug trafficking crime," *see* 8 U.S.C. § 1101(a)(43)(B), because his second conviction "would be punishable as a felony, under the Controlled Substances Act." App., *infra*, at 9a. The BIA rejected petitioner's argument that his state conviction did not meet the statutory requirements for recidivist possession under the CSA, 21 U.S.C. § 851, stating that it would not "presume the process of the 'actual' convicting jurisdiction" in determining whether an offense constitutes an aggravated felony. App., *infra*, 10a.

5. Petitioner filed an appeal in the court of appeals. C.A.R. 8. Before that court issued an opinion, however, the government filed an unopposed motion

to remand the case to the BIA for reconsideration in light of this Court's decision in *Lopez v. Gonzales*. *Id.* The Seventh Circuit granted the motion and remanded the case. *Id.* at 7.

6. On remand, the BIA issued a second opinion affirming the decision of the IJ, relying on its en banc decision in *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382 (B.I.A. 2007), *aff'd sub nom Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009), *petition for cert. filed*, No. 09-60 (July 15, 2009). In *Carachuri-Rosendo*, the Board held that an alien's second conviction for simple possession is a conviction of an aggravated felony only if the individual's "status as a recidivist drug possessor [was] . . . admitted or determined by a court or jury within the prosecution for the second drug crime." *Id.* at 391. The Board also held, however, that it was bound by circuit precedent where a court of appeals had held to the contrary. *See id.* at 393-94. Because the Seventh Circuit in *United States v. Pacheco-Diaz*, 506 F.3d 545, 550 (7th Cir. 2007), *reh'g denied*, 513 F.3d 776 (2008), had held that a "second drug possession charge" would be treated as a federal felony under Section 844(a) and thus an aggravated felony in the sentencing context, which "has the same meaning as in the immigration context," *see* U.S.S.G. § 2L1.2 & cmt. n.3(A)), the Board concluded that circuit precedent "control[led]" petitioner's case and required the Board to affirm. App., *infra*, 5a.

7. Petitioner again appealed to the Seventh Circuit, which suspended his appeal pending resolution of *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008), *reh'g and reh'g en banc denied*, unpublished order, Nos. 06-3476, 06-3987, 06-3994 (Apr. 16,

2009), *petition for cert. filed*, No. 09-5386 (July 15, 2009), a case that raised the same question presented in this case. App., *infra*, 2a. On September 15, 2008, the court of appeals issued an opinion in *Fernandez* holding that "an alien's second (or subsequent) state conviction for simple drug possession amounts to an aggravated felony in terms of a felony punishable under the [CSA]," even "when the state did not treat the alien as a recidivist." *Fernandez*, 544 F.3d at 866. On June 4, 2009, the court of appeals denied petitioner's petition for review of the BIA decision, citing the court's decision in *Fernandez* and concluding that petitioner's second possession offense "constitutes a 'drug trafficking crime' and, thus, an aggravated felony under 8 U.S.C. § 1101(a)(43)(B)." App., *infra*, at 2a.

REASONS FOR GRANTING THE PETITION

There is a mature and acknowledged conflict among the courts of appeals on whether an alien convicted of simple drug possession can be deemed "convicted" of an "aggravated felony" on the theory that he could have been prosecuted as a recidivist, even if he in fact was not prosecuted as a recidivist and no court or jury thus made such a finding in connection with his conviction. Not only have six courts of appeals resolved the issue, but the BIA has established that its approach will govern in removal proceedings in any circuit yet to issue a controlling decision. The issue is a recurring and important one for the many aliens subject to mandatory removal under the approach of the court of appeals below, and this case presents a highly suitable vehicle for resolving the conflict. In addition, the court of ap-

peals' decision cannot be squared with the plain terms of the governing statutes.

A. THERE IS A DEEP AND ACKNOWLEDGED CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTION PRESENTED

1. The courts of appeals have explicitly acknowledged the existence of a 4-2 "circuit split" on whether an alien in petitioner's circumstances can be considered convicted of an aggravated felony under the INA. *See, e.g.*, *Carachuri-Rosendo*, 570 F.3d at 267 n.5; *Fernandez*, 544 F.3d at 866-67. Two courts of appeals have held that a second state conviction for simple possession constitutes conviction of an aggravated felony regardless of whether there was any recidivism finding by the convicting judge or jury. The court below reached that conclusion. App., *infra*, 2a; *accord Fernandez*, 544 F.3d at 866; *Pacheco-Diaz*, 506 F.3d at 548-49 (applying eight-level enhancement to sentence on ground that second state possession offense constitutes an "aggravated felony"). The Fifth Circuit has reached the same conclusion, holding that an alien's second possession offense "qualified as an aggravated felony because it . . . *could have been* punished as a felony under the CSA's recidivism provision." *Carachuri-Rosendo*, 570 F.3d at 265 (emphasis added); *see United States v. Sanchez-Villalobos*, 412 F.3d 572, 577 (5th Cir. 2005) (holding the same in sentencing context).

By contrast, four circuits have held that an alien convicted a second time for simple possession cannot be considered "convicted" of an aggravated felony in the absence of any recidivism finding in the proceed-

ings before the convicting court. To begin with, in *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), the Third Circuit reversed a ruling denying cancellation of removal to an alien twice convicted of misdemeanor drug offenses. Observing that "[o]ne cannot suffer the disabilities associated with having been convicted of an aggravated felony unless one has been *convicted* of a felony," the Third Circuit concluded that the alien's second offense failed to constitute an aggravated felony because his "[recidivist] status was never litigated as a part of . . . the second misdemeanor proceeding." *Id.* at 136, 138. Similarly, in *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006), the First Circuit held that an alien's second possession conviction failed to constitute a drug trafficking "aggravated felony" because the record associated with the second conviction "contain[ed] no reference to [the alien's] prior conviction, or to any other factor that would hypothetically convert his [second] state misdemeanor conviction into a felony under federal law." *Id.* at 86.

The Second and Sixth Circuits, in decisions postdating this Court's decision in *Lopez*, have joined the First and Third Circuits. In *Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008), the Sixth Circuit held that an alien's second conviction failed to amount to an aggravated felony under the INA because his "second drug-possession conviction made no reference to his first such conviction." *Id.* at 448. The Second Circuit later agreed, holding "that a second conviction for simple drug possession under state law is not a felony under the [CSA] simply because it *could have been* prosecuted as a recidivist offense under 21 U.S.C. § 844(a)." *Alsol v. Mukasey*, 548 F.3d 207,

210 (2d Cir. 2008). Instead, the court explained, if an IJ denies cancellation of removal on the basis of a prior conviction, "the fact of recidivism must be reflected in the conviction the government seeks to classify as an aggravated felony," rather than "merely in [a defendant's] underlying conduct." *Id.* at 217.[1] Both of those circuits, like the court of appeals below and the Fifth Circuit, have explicitly recognized the division of authority. *See Carachuri-Rosendo*, 570 F.3d at 267 n.5; *Alsol*, 548 F.3d at 213-14; *Fernandez*, 544 F.3d at 872 & n.8; *Rashid*, 531 F.3d at 443-445.

The 4-2 conflict among the courts of appeals is mature and entrenched, and can be resolved only by this Court. Four courts of appeals have now addressed the issue raised by this case following this Court's decision in *Lopez*, and those four courts have divided 2-2. The competing opinions thoroughly canvass the arguments on both sides of the issue, and the court of appeals below and the Fifth Circuit have considered and rejected the majority view. And despite its recognition of the conflict, the court of appeals has refused to rehear the issue en banc. *See Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008), *reh'g and reh'g en banc denied*, unpublished order, Nos. 06-3476, 06-3987, 06-3994 (Apr. 16, 2009); *see*

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[1] The Ninth Circuit has also ruled that a second misdemeanor offense fails to constitute an aggravated felony, but in doing so it relied on an en banc decision that has since been rejected by this Court. *See Ferreira v. Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004) (citing *United States v. Corona-Sanchez*, 291 F.3d 1201, 1209 (9th Cir. 2002) (en banc)); *United States v. Rodriquez*, 128 S. Ct. 1783, 1787-93 (2008) (rejecting approach taken in *Corona-Sanchez*).

also United States v. Pacheco-Diaz, 506 F.3d 545 (7th Cir. 2007), *reh'g denied*, 513 F.3d 776 (2008).

2. In addition to the 4-2 conflict among the courts of appeals, the BIA, "the agency with the expertise in immigration matters," *Omari v. Holder*, 562 F.3d 314, 322 (5th Cir. 2009), has addressed and resolved the issue. Sitting en banc, the BIA concluded that a state possession conviction could be deemed punishable as a felony under federal law due to recidivism only if "the State offense corresponds in a meaningful way to the essential requirements that must be met before a felony sentence can be imposed under Federal law on the basis of recidivism." *In re Carachuri-Rosendo*, 24 I. & N. Dec. at 391. The BIA thus held that a state possession conviction fails to qualify as an aggravated felony based on recidivism "unless the State successfully sought to impose punishment for a recidivist drug conviction"—that is, unless the defendant's "status as a recidivist" was "admitted or determined by a court or jury within the prosecution for the second drug [possession] crime." *Id.*

The BIA decision is especially significant in light of the Board's prescription that its resolution now governs removal proceedings in any circuit in which the court of appeals has yet to issue a controlling decision. *Id.* at 393-94. As a result, the approach of the court of appeals below governs in two circuits, which have considered and rejected the BIA's view; the contrary approach under which an alien in petitioner's circumstances fails to qualify as an aggravated felon governs in four circuits; and the BIA's agreement with that majority approach governs removal proceedings in all remaining circuits.

The upshot is that, in the two circuits that have jurisdiction to review over one-quarter of the immigration proceedings completed in this country each year, an alien in petitioner's position is categorically ineligible to seek cancellation of removal. *See* Office of Planning, Analysis, and Technology, U.S. Dep't of Justice Executive Office for Immigration Review, FY 2008 Statistical Year Book, at B6 tbl.2A (2009), *available at* http://www.usdoj.gov/eoir/statspub/fy08syb.pdf (collecting total immigration court completions by court). But in every other circuit, an identically-situated alien would have an opportunity to obtain cancellation of removal and thus to remain in the United States. There is no justification for permitting that stark disparity of treatment to persist, particularly in view of the Constitution's contemplation of a "uniform Rule of Naturalization." U.S. Const. art. I § 8, cl. 4.

B. THE QUESTION PRESENTED IS HIGHLY IMPORTANT AND RECURRING, AND THIS CASE PRESENTS A HIGHLY SUITABLE VEHICLE FOR RESOLVING IT

1. a. As the BIA recognized in its en banc opinion in *Carachuri-Rosendo*, the proper treatment under the INA of a second or subsequent conviction for simple drug possession is "important in general," and is deserving of a uniform national resolution. 24 I. & N. Dec. at 388. That six courts of appeals have issued controlling decisions on the issue further attests to its significance. Given the frequency with which defendants are convicted of simple drug possession, there is no reason to suppose that the issue's significance will abate over time.

Indeed, the issue continues to arise frequently in the immigration context. Several petitions for review that raise the question presented in this case are currently pending both in the court below and in the Fifth Circuit.[2] In addition, the same issue arises in criminal cases. *See* 8 U.S.C. § 1326(b) (increasing maximum sentence for illegal re-entry where "removal was subsequent to a conviction for commission of an aggravated felony"); U.S.S.G. § 2L1.2 (providing for upward adjustment for defendant convicted of an "aggravated felony"). The Sentencing Guidelines make clear that the "the term 'aggravated felony'" in the criminal context has the same meaning as in the immigration context. U.S.S.G. § 2L1.2 & cmt. n.3(A). And criminal defendants regularly file appeals solely to challenge an aggravated felony designation.[3]

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[2] *See, e.g.*, *Garbutt v. Holder*, Dkt. No. 08-4188 (7th Cir. filed Dec. 16, 2008); *Ffrench v. Holder*, Dkt. No. 08-4162 (7th Cir. filed Dec. 11, 2008); *Ramirez-Solis v. Holder*, Dkt. No. 08-3497 (7th Cir. filed Oct. 1, 2008); *Rodriguez-Diaz v. Holder*, Dkt. No. 08-3309 (7th Cir. filed Sept. 8, 2008); *Lopez-Mendoza v. Holder*, Dkt. No. 08-2916 (7th Cir. filed July 31, 2008); *Alvarez v. Holder*, Dkt. No. 08-2902 (7th Cir. filed July 30, 2008); *Lemaine v. Holder*, Dkt. No. 08-60286 (5th Cir. filed Apr. 2, 2008); *Young v. Holder*, Dkt. No. 08-60278 (5th Cir. filed Mar. 28, 2008); *Martinez-Valero v. Holder*, Dkt. No. 08-60234 (5th Cir. filed Mar. 20, 2008); *Donnoli v. Holder*, Dkt. No. 08-60168 (5th Cir. filed Feb. 27, 2008); *Beckford v. Holder* (No. 08-1355) (7th Cir. filed Feb. 14, 2008).

[3] *See, e.g.*, *United States v. Gonzalez*, No. 08-20753, 2009 WL 1687797 (5th Cir. June 16, 2009) (per curiam); *United States v. Rodriguez-Montelvo*, No. 08-50979, 2009 WL 1685153 (5th Cir. June 16, 2009) (per curiam); *United States v. Mendez-Monroy*, No. 08-50790, 2009 WL 1676117 (5th Cir. June 16, 2009) (per curiam); *United States v. Alfaro-Cardenas*, No. 08-

The uncertainty caused by the conflict frustrates the ability of defense counsel and prosecutors to offer a defendant charged with a possession offense meaningful advice concerning the immigration consequences of a guilty plea or conviction. *See INS v. St. Cyr*, 533 U.S. 289, 322 (2001) ("There can be little doubt that . . . alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions."). Under 8 U.S.C. § 1226(c)(1)(B), the Attorney General must detain any alien removable for violating a state law related to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)(i). Consequently, any alien whom the government seeks to remove for a controlled substance offense will automatically be detained and subject to the circuit law that governs the jurisdiction of his detention. *See* 8 U.S.C. § 1252(b)(2) (providing that any "petition for review [of an order of removal] shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings"). And because the site of immigration detention bears no necessary connection to the site of conviction or residence, defense attorneys and prosecutors will be unable to predict with certainty what law will be applied. In addition, the approach of the court of appeals below tends to "undermin[e] the State's ability to negotiate plea agreements with defendants [who] would admit guilt to drug possession with the understanding that their

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40779, 2009 WL 1676095 (5th Cir. June 16, 2009) (per curiam). The issue continues to arise in other circuits as well. *See, e.g.*, *United States v. Ayon-Robles*, 557 F.3d 110, 112-13 (2d Cir. 2009) (per curiam) (applying court's decision in *Alsol* in the criminal context).

criminal records would reflect [a] misdemeanor," but would refuse to do so when the basis for an "aggravated felony" is at stake. *Alsol*, 548 F.3d at 217.

b. Whether an alien is properly deemed "convicted" of an "aggravated felony" has substantial and far-reaching consequences for immigrants and their families. An alien convicted of an aggravated felony is subject to removal, 8 U.S.C. § 1227(a)(2)(A)(iii); presumed removable, 8 U.S.C. § 1228(c); ineligible to seek judicial review of a removal order, 8 U.S.C. § 1252(a)(2)(C); and, of course, ineligible to seek cancellation of removal, 8 U.S.C. § 1229b(a)(3).

If removed from the United States, an aggravated felon is permanently barred from seeking readmission to the country (absent a waiver), and is subject to increased punishment if he returns. *See* 8 U.S.C. §§ 1182(a)(9)(A)(ii), 1326(a)-(b) (increasing maximum sentence for illegal entry into the country from two to twenty years of imprisonment). If convicted of an aggravated felony on or after November 29, 1990, an alien is categorically unable to demonstrate the "good moral character" required for naturalization. 8 U.S.C. § 1101(f)(8); 8 C.F.R. § 316.10(b)(1)(ii). And because federal law automatically categorizes any aggravated felony as a "particularly serious crime," an aggravated felon is ineligible for asylum. *See* 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i).

2. This case presents a highly suitable vehicle for resolving the proper treatment of an alien convicted of simple possession without any finding of a prior conviction. Petitioner properly raised and preserved in his immigration proceedings and in the court of appeals his request for cancellation of removal, as

well as his objection to the IJ's conclusion that he has been convicted of a drug-trafficking aggravated felony. *See* App., *infra*, at 8a-9a. The court of appeals below has already thoroughly reviewed and assessed the competing arguments on both sides of the conflict and denied rehearing en banc. *See Fernandez*, 544 F.3d at 865-74; *id.* at 874-80 (Rovner, J., dissenting), *reh'g and reh'g en banc denied*, unpublished order, Nos. 06-3476, 06-3987, 06-3994 (Apr. 16, 2009), *petition for cert. filed* (July 15, 2009).

Furthermore, this case presents in especially stark relief the substantial implications of the question presented for an alien designated as an "aggravated felon." Petitioner became a lawful permanent resident of the United States in 1990 and developed deep roots thereafter. He has worked as a tree trimmer since 1998, and is married to a lawful permanent resident, with whom he has three children and two grandchildren who are United States citizens.

Petitioner was removed from the country and separated from his family based on a conviction for simple drug possession that was then eight years old. Although there was no finding in that proceeding that petitioner was a recidivist possessor, the court of appeals' approach treats petitioner as an "aggravated felon" on the theory that he could have been prosecuted as a recidivist had he been charged in the federal system. The contrary view adopted by a majority of circuits would enable petitioner to seek relief that would allow him to live in the United States with his family.

C. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER HAS BEEN "CONVICTED" OF AN "AGGRAVATED FELONY"

The court of appeals in this case held that petitioner's conviction for simple possession subjected him to mandatory removal from the country because, even though that offense is a misdemeanor under federal law, 21 U.S.C. § 844, petitioner could have been federally prosecuted for recidivist possession—a federal felony. *Id.* That holding cannot be squared with the text of the INA or with the other relevant sources of statutory interpretation.

1. As relevant here, the INA subjects to mandatory deportation a person who "has . . . been convicted" of an "aggravated felony," *i.e.*, a "felony punishable under" the federal drug laws. 8 U.S.C. § 1229b(a)(3); 18 U.S.C. § 924(c)(2). A person "convicted" of simple possession "has been convicted" of an offense that is punishable under the federal drug laws as a misdemeanor, not a "felony." *See* 21 U.S.C. § 844(a). Such a person therefore remains eligible for cancellation of removal.

That is true regardless of whether that person *could have been* prosecuted for recidivist possession. For purposes of determining whether a person is subject to mandatory removal, the statute focuses on what a person in fact "has been convicted" of, not what a person could have been prosecuted for. *See Alsol*, 548 F.3d at 215 (INA requires "an actual conviction for an offense that proscribes conduct that is punishable as a federal felony, not a conviction that *could* have been obtained if it had been prosecuted");

Rashid, 531 F.3d at 445 (statutory question is "whether the crime that an individual was *actually convicted of* would be a felony under federal law," not "what federal crimes an individual could hypothetically have been charged with") (emphasis added); *see also Pacheco-Diaz*, 513 F.3d at 781 (Rovner, J., dissenting from denial of rehearing) (objecting to majority's focus on what an individual "could have been charged with").

An examination of what would have happened to petitioner in an analogous federal law prosecution underscores the significance of the INA's requirement of an actual felony conviction. Under the federal drug laws, a person convicted of possession may be sentenced as a felon for recidivist possession only if the prosecutor files an information charging recidivism, and the court makes a finding that the person is a recidivist. 21 U.S.C. §§ 844(a), 851. Accordingly, if a federal prosecutor charged petitioner only with simple possession and petitioner pleaded guilty only to that charge, petitioner would have been convicted of simple possession, a misdemeanor, not recidivist possession, a felony. In that event, petitioner could not be considered to have been convicted of the felony of recidivist possession simply because the federal prosecutor *could have* charged him as a recidivist. *See United States v. LaBonte*, 520 U.S. 751, 759-60 (1997) ("[F]or defendants who have received the notice under § 851(a)(1), . . . the 'maximum term authorized' is the enhanced term. For defendants who did not receive the notice, the unenhanced maximum applies." (quoting 28 U.S.C. § 994(h))).

The same analysis applies to petitioner's state law conviction. The text of the INA draws no distinction between federal and state law convictions. Indeed, it expressly requires their parallel treatment. *See* 8 U.S.C. § 1101(a)(43) (applying the definition of aggravated felony to an offense "whether in violation of Federal or State law"). Petitioner, having been charged with and convicted of simple possession, remains eligible to seek cancellation of removal. He is not subject to mandatory deportation on the theory that he instead could have been prosecuted for recidivist possession in the federal system.

In its filings in *Carachuri-Rosendo*, 24 I. & N. Dec. 382, the Department of Homeland Security (DHS) changed its position on the question presented in this case, evidently based on its implications for federal law convictions. Initially, the DHS took the position that a state conviction for simple possession constitutes an aggravated felony whenever an alien "has a criminal history that *could have* exposed him to felony treatment had he been prosecuted federally." *Id.* at 390. But the DHS changed its position after argument before the BIA, "conced[ing] that a conviction arising in a State that has drug-specific recidivism laws cannot be deemed a State-law counterpart to 'recidivist possession' unless the State actually used those laws to prosecute the [defendant]." *Id.* at 390-91. The DHS did so apparently based on concerns that its initial position logically would result in "a Federal *misdemeanor* conviction under 21 U.S.C. § 844(a) being treated as a hypothetical Federal *felony* on the ground that the defendant had prior convictions that *could have been*

used as the basis for a recidivist enhancement." *Id.* at 391. The same concerns should apply here.

2. The INA's definition of "aggravated felony" as applied to drug crimes confirms that a state conviction for simple possession does not constitute an aggravated felony. With respect to drug offenses, the definition treats as an aggravated felony only "illicit *trafficking* in a controlled substance." 8 U.S.C. § 1101(a)(43)(B) (emphasis added). It then includes within that definition any "drug *trafficking* crime (as defined in section 924(c) of title 18)." *Id.* (emphasis added). Section 924(c) in turn defines a "drug trafficking crime" as, among other things, "any felony punishable under the Controlled Substances Act." 18 U.S.C. § 924(c)(2). As this Court emphasized in *Lopez*, the determination whether a state conviction for possession of a controlled substance constitutes a "felony punishable under" the federal drug laws must begin with a "commonsense conception of 'illicit trafficking,' the term ultimately being defined." 549 U.S. at 53. "[O]rdinarily[,] 'trafficking' means some sort of commercial dealing." *Id.* at 53-54 (citing Black's Law Dictionary 1534 (8th ed. 2004)). And "[c]ommerce . . . certainly [ ] is no element of simple possession." *Id.* at 54.

The Court in *Lopez* noted that certain possession offenses under the CSA are punishable as felonies, including recidivist possession. 549 U.S. at 54, 55 n.6. But the Court made clear that a departure from the ordinary meaning of trafficking to include a possession offense could be justified only by a "clear statutory command" that "coerce[d]" its inclusion. *Id.* at 55 n.6. Here, there is no "clear statutory command" that "coerces" the "inclusion" of a convic-

tion for simple possession as an aggravated felony simply because it might have been prosecuted as recidivist possession instead. To the contrary, given the textual requirement of a felony "conviction," there is a clear statutory command that compels its exclusion.

3. The court of appeals' interpretation is not only inconsistent with statutory text; it would also undermine important policies advanced by Congress's felony conviction standard. Mandatory removal is an especially harsh sanction. That is especially true for lawful permanent residents like petitioner, who became a lawful permanent resident in 1990 and has established deep roots here. Nor are the consequences of a person's deportation felt by that person alone; they extend to persons like petitioner's family members, who, under the court of appeals' decision, must either leave the country or be separated from him. The requirement of a recidivist conviction ensures that a prosecutor has made a considered judgment that the defendant's conduct warrants a charge and conviction that automatically gives rise to those severe consequences. Had Congress made a potential felony charge rather than an actual felony conviction the predicate for mandatory removal, that salutary protection against unwarranted removal would not exist.

Indeed, the approach adopted by the court of appeals stands fundamentally at odds with Congress's basic objectives in enacting 21 U.S.C. § 851. Prior to the enactment of Section 851, a prosecutor was required to advise the court whether a drug possession conviction was the offender's first or subsequent offense and then file an information "setting forth

[any] prior convictions." *See United States v. Noland*, 495 F.2d 529, 530 (5th Cir. 1974), *see also* 26 U.S.C. § 7237(c)(2) (1964). The district court was then required to sentence the defendant as a recidivist unless the defendant could successfully prove that he had no prior conviction. *See* 26 U.S.C. § 7237(c)(2) (1964).

By enacting Section 851, Congress sought to make the penalty structure for drug offenses "more flexible." H.R. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576. To accomplish that goal, Congress provided that "[n]o person . . . shall be sentenced to increased punishment by reason of one or more prior convictions" unless the prosecutor files an information prior to trial or plea alleging those prior convictions. 21 U.S.C. § 851(a)(1). That statutory directive reflects Congress's view that prosecutors have the experience and judgment to determine when a recidivist charge is appropriate based on the defendant's "individual circumstances." *See* H.R. Rep. No. 91-1444, *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576. By linking mandatory removal to an actual felony conviction, rather than a conceivable felony charge, Congress incorporated that same prosecutorial screen into the removal process.

The court of appeals' standard is inconsistent with the congressional determination reflected in Section 851. Under the court of appeals' standard, a prosecutor's charging decisions carry no weight; individuals are treated as recidivist felons even when there is no decision to charge them as such. And the system of careful and conscientious prosecutorial decision-making mandated by Congress is supplanted by a regime under which all persons convicted of

simple possession who have prior drug convictions are treated as convicted of an aggravated felony. *See Alsol*, 548 F.3d at 217 (concluding that the standard adopted by the court below "intrude[s] on prosecutorial discretion to make charging decisions," and "undermin[es] the State's ability to negotiate plea agreements").

The court of appeals' mandatory removal standard also undermines another significant feature of the recidivist conviction requirement—that the determination of recidivist possession must be made in a court of law in connection with proceedings concerning the conviction, rather than by an immigration judge. That protection is important. Under federal law, for example, a person charged with recidivist possession has an opportunity to contest the validity of a charged prior conviction. 21 U.S.C. § 851. If the prior conviction is invalid, a person may not be convicted of recidivist possession. *Id.* An immigration judge, by contrast, lacks authority to inquire into the validity of a prior conviction. *Alsol*, 548 F.3d at 217.

The court of appeals' interpretation therefore exposes a person convicted of simple possession to mandatory removal even if a prior drug conviction is wholly invalid. That danger is a real one. "[M]any misdemeanor or lesser convictions involve indigent defendants whose convictions are processed under questionable circumstances and may be found invalid if challenged." *Rashid*, 531 F.3d at 447 (internal quotation marks omitted). By making a felony conviction the predicate for mandatory deportation, Congress avoided the palpable unfairness of requiring mandatory deportation based on a conviction

that could have been successfully challenged in a prosecution for recidivist possession. *Alsol*, 548 F.3d at 217; *Rashid*, 531 F.3d at 446-47.

The text of the INA and the other relevant sources of statutory interpretation thus demonstrate that the court of appeals erred in its interpretation of the statute. To the extent that there is any ambiguity, however, the rule of lenity applied in deportation cases requires an interpretation that favors petitioner. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Under that rule, courts "[should] not assume that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used" in a statute. *INS v. Errico*, 385 U.S. 214, 225 (1966). Because the question presented arises with respect to the maximum sentence available for the crime of illegal reentry, *see* 8 U.S.C. § 1326(b), the rule of lenity applied in criminal cases applies in this case as well. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). Here, at the very least, the court of appeals' interpretation is not required by the narrowest possible meaning of the statute. The rule of lenity therefore requires its rejection.

4. In adopting its possible felony prosecution standard, the court of appeals did not address the INA's text or other relevant sources of statutory interpretation. Instead, it determined that it was bound by its decision in *Fernandez*, which concluded that this Court's holding in *Lopez* "settle[d] the matter." *Fernandez*, 544 F.3d at 870. In particular, the *Fernandez* court viewed its interpretation to be required by the Court's holding that "a state offense constitutes a 'felony punishable under the Controlled

Substances Act' only if it proscribes conduct punishable as a felony under that federal law." *Lopez*, 549 U.S. at 60; *see Fernandez*, 544 F.3d at 870-71. The court of appeals' reliance on *Lopez* was entirely misplaced.

The court of appeals erred in attempting to parse the language of a holding directed to a different issue—whether the state's denomination of an offense as a felony makes it an aggravated felony when the conduct proscribed by the offense is punishable only as misdemeanor under federal law. In any event, as the BIA and the Second and Sixth Circuits have correctly concluded, far from dictating the court of appeals' approach, *Lopez* supports the contrary approach. *See Carachuri-Rosendo*, 24 I. & N. Dec. at 390; *Alsol*, 548 F.3d at 215; *Rashid*, 531 F.3d at 445-46. When a person is charged with and convicted of simple possession, the conduct proscribed by the offense is simple possession, a federal law misdemeanor. It is only when a prosecutor charges the defendant as a recidivist possessor, and the defendant is found to have been a recidivist possessor, that the conduct proscribed by the offense becomes recidivist possession, a federal felony. *See Carachuri-Rosendo*, 24 I. & N. Dec. at 390. The court of appeals accordingly erred in holding that petitioner's conviction for simple possession qualified as an aggravated felony simply because he could have been federally prosecuted for recidivist possession.

CONCLUSION

The petition in this case presents the same question presented in *Carachuri-Rosendo v. Holder*, *petition for cert. filed*, No. 09-60 (July 15, 2009), and *Fernandez v. Holder*, *petition for cert. filed*, No. 09-5386 (July 15, 2009). Petitioner in *Fernandez* has asked this Court to hold the petition in that case pending the Court's disposition of the petition in *Carachuri-Rosendo*, *supra*.

In this case, the Court should hold the petition pending the Court's disposition of the petition in *Carachuri-Rosendo*, *supra*, and then dispose of the petition in this case accordingly. In the alternative, the Court should grant the petitions in this case and in *Carachuri-Rosendo*, *supra*, and then consolidate the cases and allot a total of one hour for oral argument.

Respectfully submitted,

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August 17, 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ORDER

Submitted May 29, 2009
Decided June 4, 2009

BEFORE

DANIEL A. MANION, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*

No.: 08-1217	MARTIN ESCOBAR, *Petitioner* v. ERIC H. HOLDER, JR., Attorney General of the United States, *Respondent*
Originating Case Information:	
Agency Case No.: A91-173-187 Board of Immigration Appeals	

The following is before the court:
PETITIONER'S POSITION STATEMENT, filed on April 30, 2009, by counsel for the petitioner.

The court previously suspended proceedings in this petition for review pending resolution of *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2009), and continued the suspension while the petition for rehearing was pending. Now that the petition for rehearing has been denied, the petitioner has filed a statement of position conceding that the petition is controlled by the holding in *Fernandez* and must be denied under its authority. The sole issue raised in the present petition is whether a recidivist drug possession offense constitutes a "drug trafficking crime" and, thus, an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). In *Fernandez*, the court held that such an offense is considered an aggravated felony for immigration purposes. Based on the holding in *Fernandez*, the petitioner is inadmissible and further briefing would not assist the court.

Accordingly,

IT IS ORDERED that the petition for review is summarily **DENIED**.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A91 173 187-Broadview Date: DEC 31, 2007

In re: **MARTIN ESCOBAR**

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kola, Isuf, Esq.

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II) - Controlled Substance Violation

APPLICATION: Cancellation of Removal

ORDER:

PER CURIAM. This case was last before us on October 13, 2006. At that time, the record had shown that, on July 11, 1997, the respondent pled guilty in the Circuit Court of Cook County to the offense of possession of cannabis in violation of

section 550/4(b) of Chapter 720 of the Illinois Compiled Statutes (ILCS). He was sentenced to 6 months of court supervision (Exh. 3). Subsequently, on Mach 13, 1998, pursuant to a January 15, 1998, indictment, the respondent pled guilty in the Circuit Court of Cook County to the offense of possession of a controlled substance in violation of section 570/402(c) of Chapter 720 of the ILCS (Exh. 2). While the respondent argued the fist conviction was not "final" as it was dismissed after a period of supervision, we concluded, inter alia, that, as his second possession offense was committed after his first possession conviction was final for immigration purposes, the latter conviction was punishable under 21 U.S.C. § 844(a) as a felony. Accordingly, we affirmed the Immigration Judge's decision that the respondent was convicted of an aggravated felony under section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B), to wit, a drug trafficking crime, and was ineligible to seek cancellation of removal pursuant to section 240A(a) of the Act, 8 U.S.C. § 1229b(a). *See* section 240A(a)(3) of the Act, 8 U.S.C. § 1229b(a)(3).

On April 13, 2007, the United States Court of Appeals for the Seventh Circuit remanded this case to us for further consideration in light of the Supreme Court decision in *Lopez v. Gonzales*, 549 U.S. ___, 127 S. Ct. 625 (2006), which held that a state offense constitutes a "felony punishable under the Controlled Substances Act" only if it proscribes conduct punishable as a felony under that federal law. Thus, for a state drug offense to qualify as a "drug trafficking crime" and, by extension, an aggravated felony, it must correspond to an offense that carries a maximum term of imprisonment

exceeding 1 year under the CSA. *Id.* at 631 & n.7. Interpreting *Lopez v. Gonzales*, *supra*, we recently held, in *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), that the decisional authority from the Supreme Court and the controlling Federal circuit court of appeals is determinative of whether a state drug offense constitutes an aggravated felony under section 101(a)(43(B) of the Act, by virtue of its correspondence to the Federal felony offense of "recidivist possession" as defined by 21 U.S.C. § 844(a). *See Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002). We noted in *Matter of Carachuri-Rosendo*, 24 I&N Dec. at 385, that, at present, the pertinent authority from the Seventh Circuit is *United States v. Pacheco-Diaz*, 506 F.3d 545 (7th Cir. 2007), a sentence enhancement case. In that decision, issued subsequent to Lopez v. Gonzales, supra, the Seventh Circuit held that, because the alien was convicted of a prior drug offense, his subsequent Illinois conviction for possession of marihuana (sic) could have been punished under federal law as a felony with a penalty of up to two years imprisonment had the charge against the alien for possession of marihuana been brought in federal court; thus, the alien's conviction for possession of marihuana was an "aggravated felony" within the meaning of the provision of Sentencing Guidelines authorizing enhancement of the base offense level for an illegal re-entry conviction for a previous aggravated felony conviction. We find, consistent with our holding in *Matter of Carachuri-Rosendo*, that controlling precedent in the Seventh Circuit dictates that the respondent's 1998 Illinois conviction for possession of a controlled substance qualifies as an aggravated felony conviction by virtue of the fact that the underlying possession of a controlled substance

offense was committed after the respondent's prior State conviction for possession of cannabis became final within the meaning of 21 U.S.C. § 844(a) (providing that an offense involving the simple possession of a controlled substance is punishable by up to 2 years' imprisonment if committed after a prior drug conviction became final).

In short, the Immigration Judge's legal conclusion in the respondent's case, that he is ineligible for cancellation of removal, is correct under applicable leg standards. The appeal is dismissed.

/s/

FOR THE BOARD

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A91 173 187-Chicago Date: OCT 13, 2006

In re: **MARTIN ESCOBAR**

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kola, Isuf, Esq.

ON BEHALF OF DHS: Thomas O'Malley
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II) - Controlled Substance Violation

APPLICATION: Cancellation of Removal

ORDER:

PER CURIAM. The respondent's appeal of the Immigration Judge's May 1, 2006, decision finding

him removable as charged and denying his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1227b(a), is dismissed.

The record reflects that the respondent was convicted on July 11, 1997, in the Circuit Court of Cook County, Illinois, for the offense of possession of cannabis in violation of Chapter 720, section 550(4)(b) of the Illinois Compiled Statute (Exhs. 2 and 3). Subsequently, on March 13, 1998, the respondent was convicted in the Circuit Court of Cook County, Illinois, for the offense of possession of a controlled substance, a Class 4 Felony, in violation of Chapter 720, section 570/402(c) of the Illinois Compiled Statute (Exhs. 2 and 3). On January 5, 2006, the respondent was placed into these proceedings when he was apprehended as a returning lawful permanent resident of the United States (Exh. 1).

In his May 1, 2006, decision finding the respondent removable as charged and denying his application for cancellation of removal under section 240A(a) of the Act, the Immigration Judge concluded that the respondent's 1998 drug possession conviction coupled with his 1997 drug possession conviction qualified as an aggravated felony as that term is defined in section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B), in accordance with the precedent of the United States Court of Appeals for the Seventh Circuit, in whose jurisdiction this case arises (I.J. Dec. at 2-4). In particular, the Immigration Judge found that the respondent's 1998 conviction for simple possession qualifies as a "drug trafficking crime" because it is a felony under 21 U.S.C. § 844(a) as a result of his status as a repeat

offender (I.J. Dec. at 2-4). Despite the respondent's arguments on appeal, we concur with the Immigration Judge's conclusions in this regard (I.J. Dec. at 2-4). *See United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005); *but see Berhe v. Gonzales*, 2006 WL 2729689 (1st Cir. 2006).

In *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002), this Board concluded that it would defer to the interpretation of the term "drug trafficking crime" given by each regional circuit. The Seventh Circuit recently held that a state conviction for a drug offense qualifies as an aggravated felony for purposes of section 101(a)(43)(B) of the Act when it is punishable as a felony under the Controlled Substances Act. *See Gonzales-Gomez v. Achim*, 441 F.3d 532 (7th Cir. 2006) (finding alien's single conviction for felony simple possession of a controlled substance was not an aggravated felony because it was punishable under federal law only as a misdemeanor); *see also Ali v. Ashcroft*, 395 F.3d 722 (7th Cir. 2005) (finding state felony drug conviction that is punishable under federal law as a felony is an aggravated felony under the Act). Thus, in the Seventh Circuit, a state drug conviction for simple possession of a controlled substance which occurs, and as to which the crime is committed, after a prior state drug conviction has become final qualifies as a "drug trafficking crime" under section 101(a)(43)(B) of the Act because it would be punishable as a felony under the Controlled Substances Act. *See* 21 U.S.C. § 844(a).

Moreover, we are not persuaded by the respondent's contention that the Immigration Judge erred in finding his second drug conviction to be an

aggravated felony under *Gonzales-Gomez* because his second conviction did not meet the statutory requirements that would be necessary in federal court to enhance his case to felony under 21 U.S.C. § 851. In particular, we cannot, as the respondent suggests, properly assume that a hypothetical federal prosecutor would fail to follow federal rules if the criminal prosecution were held in federal court. *Compare Berhe v. Gonzales, supra.* We find it nonsensical to prosecute the case "hypothetically" but presume the process of the "actual" convicting "jurisdiction. Further, we point out that there is no evidence that the respondent took a direct appeal from his first drug conviction thus we find that it is final for our purposes. We do not agree with the respondent's assertion that his conviction was not "final" for immigration purposes because Illinois law includes a period of supervision and dismissal for certain convictions such as his first drug conviction. As a result, we find no reason to disturb the Immigration Judge's decision finding that the respondent's 1998 repeat drug offense is an aggravated felony rendering the respondent ineligible for cancellation of removal under the Act. *See, i.e. Matter of L-G*, 21 I&N Dec. 1163 (BIA 1999).

We turn now to the respondent's appellate contention that the Immigration Judge erred by failing to advise him of the availability of his right to withdraw his application for admission to the United States during the proceedings. *See* Respondent's Brief at 7-12. Pursuant to the regulation found in 8 C.F.R. § 1240.11(a)(2) (2006), Immigration Judges have an affirmative duty to inform an alien in removal proceedings of his "apparent eligibility" to apply for any form of relief under the Act and to

afford the alien an opportunity to submit applications for relief during the removal hearing. In its decision in *Asani v. INS*, 154 F.3d 719, 727-28 (7th Cir. 1998), the Seventh Circuit appeared to hold that this regulatory requirement is mandatory and that it applies even as to aliens represented by counsel. *See also Matter of Cordova*, 22 I&N Dec. 966, 970-71 (BIA 1999); *Matter of Ulloa*, 22 I&N Dec. 725, 726 (BIA 1999). However, we do not read the Seventh Circuit's decision in *Asani* as requiring an Immigration Judge to advise an alien of the ability to seek withdrawal of an application for admission since this form of "relief" ordinarily requires the concurrence of the Department of Homeland Security ("DHS"). *See* 8 C.F.R. § 1240.1(d); *see also* 8 C.F.R. § 1235.4. The record does not include any indication from the DHS that it is willing to allow a withdrawal of the respondent's application for admission.

Accordingly, the appeal is dismissed.

/s

FOR THE BOARD

APPENDIX D

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION
CHICAGO, IL 60603

In the Matter of:	Case A91-173-187
MARTIN ESCOBAR	IN REMOVAL
Respondent	PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on May 1, 2006. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to MEXICO.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to_____ alternatively to _____.

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $_____ with an alternate order of removal to _____.

[ ] Respondent's application for asylum was ( ) granted; ( ) denied; ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted; ( ) denied; ( ) withdrawn.

[ ] Respondent's application for withholding /deferral of removal under Article 3 of the U.N. Convention Against Torture was ( ) granted; ( ) denied; ( ) withdrawn.

[X] Respondent's application for cancellation of removal under Section 240A(a) was ( ) granted; (X) denied; ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under Section 240A(b) was ( ) granted; ( ) denied; ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under Section _____ of the INA was ( ) granted; ( ) denied; ( ) withdrawn.

[ ] Respondent's application for adjustment of status under Section ____ of the INA was ( ) granted; ( ) denied; ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under Section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[X] Other: Respondent's LPR status is hereby terminated/re-entry advisal given.

Date: May 1, 2006

/s George P. Katsivalis
George P. Katsivalis
Immigration Judge

APPEAL: (Reserved)/Waived (Alien)/DHS/Both)

DUB: 5/31/06

Administrative Control Court: Immigration Court, 55 E. Monroe, Ste. 1900, Chicago, IL 60603 Hearing Conducted by Video Conference

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Chicago, Illinois

File No.: A 91 173 137 May 1, 2006

In the Matter of	)	
MARTIN ESCOBAR	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act - alien convicted of violating any law relating to a controlled substance.

APPLICATIONS: Cancellation of removal for certain lawful permanent residents on Form EOIR-42(a).

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Chris J. Bergin 2300 South Lou Island Ave. Chicago, IL 60608	Tom J. O'Malley Assistant Chief Counsel Immigration and Customs Enforcement 55 East Monroe Street Suite 1700 Chicago, Illinois 60603

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male native and citizen of Mexico who sought admission to the United States as a returning lawful permanent resident on January 5, 2006. However, the Department of Homeland Security commenced removal proceedings against the respondent, charging him with being removable pursuant to the above-captioned section of the Immigration and Nationality Act ("Act 11"). See Exhibit No.1. The Government charged the respondent with removability on the basis of a 1997 conviction for possession of cannabis and a March 13, 1998 conviction for possession of a controlled substance.

The respondent has admitted the five factual allegations contained in the Notice to Appear. The Government has submitted certified records of conviction which pertain to those two offenses. See Exhibit 2 and 3. Both the offenses of possession of a controlled substance and possession of cannabis are violations of crimes relating to a controlled substance and the respondent is removable as charged in the Notice to Appear by evidence which is clear and convincing.

The respondent seeks to file for cancellation of removal pursuant to Section 240A (a) of the Act. The Board of Immigration Appeals in Matter of Yanez, 23 I&N Dec. 390 (BIA 2002) held that possession of a controlled substance, as the respondent was convicted of under the Illinois statute, is an aggravated felony offense. An alien who has been convicted of an aggravated felony is not statutorily eligible for cancellation of removal.

See Section 240A(a)(3) of the Act. However, the Seventh Circuit Court of Appeals in a recent decision, Gonzalez-Gomez v. ACHIM, disagreed with the Board's conclusion that possession of a controlled substance under the Illinois statute is in and of itself an aggravated felony offense. The Seventh Circuit's decision does not cite to or discuss the Board's decision in Matter of Yanez nor any of the other decisions coming from the Seventh Circuit relating to what does constitute an aggravated felony drug offense. However, the decision does overrule the Board's decision in Matter of Yanez. The District Court's decision in Gonzalez-Gomez also disagreed with the Board's analysis in Yanez. The District Court decision in Masok v. ACHIM, 2005 WL 1017891 (N.D. IL. 2005) also disagreed with the Board's Yanez decision. Both of those District Court opinions indicated that in order for a drug related offense to be an aggravated felony, it must meet the definition of a "hypothetical Federal felony." That decision is in accordance with the Board of Immigration Appeals previous standard enunciated in Matter of L-G-, Int. Dec. 3254 (BIA 1995).

In addition, the Seventh Circuit Court of Appeals has also ruled that a State felony offense which is also a felony punishable under the Controlled Substances Act is an aggravated felony. Ali v. Ashcroft, 395 F.3d 722 (7th Cir. 2005).

The facts in this case clearly indicate that the respondent was convicted of possession of a controlled substance, a felony offense under the Illinois statute. The facts also show that the respondent had previously been convicted of a controlled substance violation related to possession

of cannabis prior to being convicted of the second controlled substance offense. Therefore, under the Board's previous precedence in Matter of L-G-, the District Court's decision in Mazok v. ACHIM, supra, and the Seventh Circuit's decision in Ali v. Ashcroft, supra, this respondent clearly has been convicted of a felony offense which is a felony under the Controlled Substances Act. Consequently, respondent has been convicted of a "hypothetical Federal felony." The Board in Matter of L-G-, supra, expressly ruled that an individual who had been convicted of a controlled substance offense after having been previously been convicted of a controlled substance offense has been convicted of a hypothetical Federal felony. Therefore, it is the finding of the Court that the respondent has been convicted of an aggravated felony drug offense.

The respondent has also argued that his offense is not a conviction because he received 710-1410 probation under the Illinois statute. The respondent avers that this offense is not a conviction under the Illinois statute and, therefore, the respondent has not been convicted of a drug offense. The Seventh Circuit Court of Appeals has expressly rejected this argument and has ruled that a sentence to 410 probation is a conviction under 101(a)(48)(A) of the Immigration and Nationality Act. See Gill v. Ashcroft, 335 F.3d 574 (7th Cir. 2003). Consequently, this respondent is statutorily ineligible for the relief sought. The respondent does not seek and does not appear to be statutorily eligible for any other relief from removal. Therefore, the following order will hereby be entered.

ORDER

IT IS ORDERED that the respondent shall be removed from the United States to Mexico under Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act.

/s George P. Katsivalis
GEORGE P. KATSIVALIS
United States Immigration Judge

APPENDIX F

STATUTORY PROVISIONS INVOLVED

The United States Code, 8 U.S.C. § 1101(a)(43)(B), 8 U.S.C. § 1229b(a), 18 U.S.C. § 924(c)(2), 21 U.S.C. § 844, and 21 U.S.C. § 851, provides in pertinent part as follows:

8 U.S.C. 1101(a)(43)(B)
§ 1101. Definitions

(a) As used in this Act—

* * *

(43) The term "aggravated felony" means--

* * *

(B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)[.]

8 U.S.C. § 1229b(a)
§ 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents. The Attorney General may cancel removal in the case of an alien who is inadmissible or deport-able from the United States if the alien--

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

18 U.S.C. § 924(c)(2)
§ 924. Penalties

(c)(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or chapter 705 of title 46.

21 U.S.C. § 844
§ 844. Penalty for simple possession

(a) Unlawful acts; penalties. It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 303 of this title [21 USCS § 823] or section 1008 of title III [21 USCS § 958] if that

registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this title or title III, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this title or title III, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be

imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $ 1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, United States Code, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

* * *

(c) "Drug or narcotic offense" defined. As used in this section, the term " drug, narcotic, or chemical

offense" means any offense which proscribes the pos-session, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this title.

21 U.S.C. § 851
§ 851. Proceedings to establish previous convictions

(a) Information filed by United States Attorney.

(1) No person who stands convicted of an offense under this part [21 USCS §§ 841 et seq.] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncemen of sentence.

(2) Any information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in

excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction. If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the per-son with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing.

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1). The hearing shall be before the court without a jury and either party may

introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefore, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence.

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is

otherwise not subject to an in-creased sentence as a matter of law, the court shall, at the request of the United States attorney, post-pone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations. No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
NOV 16 2009
OFFICE OF THE CLERK

No. 09-203

In the Supreme Court of the United States

MARTIN ESCOBAR, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Solicitor General
Counsel of Record
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QUESTION PRESENTED

Whether a second or subsequent state conviction for possession of a controlled substance automatically qualifies as an "aggravated felony" for purposes of 8 U.S.C. 1101(a)(43)(B), or instead qualifies only if the State applied a recidivist enhancement in that second or subsequent conviction.

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In the Supreme Court of the United States

No. 09-203

MARTIN ESCOBAR, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The decisions of the court of appeals (Pet. App. 1a-2a), the Board of Immigration Appeals (Pet. App. 3a-6a, 7a-11a), and the immigration judge (Pet. App. 12a-14a, 15a-19a) are all unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2009. The petition for a writ of certiorari was filed on August 17, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who has "been convicted of a violation of * * * any law * * * of a State * * * relating to a controlled substance" is removable.

8 U.S.C. 1227(a)(2)(B)(i). Although certain aliens may seek discretionary cancellation of removal under 8 U.S.C. 1229b(a), an alien who has been convicted of an "aggravated felony" is ineligible for such relief. 8 U.S.C. 1229b(a)(3). The INA defines an "aggravated felony" by reference to a list of categories of qualifying criminal offenses. As relevant here, the list includes "illicit trafficking in a controlled substance * * *, including a drug trafficking crime (as defined in section 924(c) of title 18)," 8 U.S.C. 1101(a)(43)(B), whether the offense was "in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (penultimate sentence). In turn, 18 U.S.C. 924(c)(2) defines a "drug trafficking crime" as, *inter alia*, "any felony punishable under the Controlled Substances Act [(CSA)] (21 U.S.C. 801 et seq.)."

One provision of the CSA, 21 U.S.C. 844(a), makes it "unlawful for any person knowingly or intentionally to possess a controlled substance" without a prescription. Although in most circumstances a defendant is subject to imprisonment for "not more than 1 year" for his first possession conviction under Section 844, "if [the defendant] commits such offense after a prior conviction under [chapter 13 of Title 21] * * *, or a prior conviction for any drug * * * offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for * * * not more than 2 years." *Ibid.*[1] The higher term of imprisonment for a second or subsequent conviction cannot, however, be imposed on a defendant unless certain procedural steps

---

[1] Some first possession offenses are subject to a felony sentence. See 21 U.S.C. 844(a) (first possession of more than five grams of substance containing cocaine base subject to five-year minimum sentence; first possession of flunitrazepam subject to imprisonment for up to three years).

have been followed. Section 851 of Title 21 provides that "[n]o person who stands convicted of an offense under [the CSA] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court * * * stating in writing the previous convictions to be relied upon," and the defendant is afforded an opportunity to challenge the validity of the prior conviction in a hearing before the court. 21 U.S.C. 851(a) and (c).

2. a. Petitioner is a native and citizen of Mexico who has been a lawful permanent resident of the United States since 1990. Pet. App. 16a; Administrative Record (A.R.) 133. In 1997, he was convicted in Illinois state court for possession of cannabis, in violation of 720 Ill. Comp. Stat. 550/4(b) (West 2003), for which he was sentenced to six months of court supervision. Pet. App. 3a-4a; A.R. 98, 123-124, 151, 163. In 1998, he was again convicted in Illinois, this time for possession of a controlled substance (cocaine) in violation of 720 Ill. Comp. Stat. 570/402(c) (West 2003), and was sentenced to two years of probation. Pet. App. 4a; A.R. 98, 123-124, 153, 163.

Although Illinois has a recidivist statute applicable to possession of a controlled substance, see 720 Ill. Comp. Stat. 570/408 (West 2003), that sentencing enhancement is inapplicable when the prior conviction was for possession of cannabis, because cannabis is not considered a "controlled substance" under Illinois law, see *People* v. *Miller*, 450 N.E.2d 767, 778 (Ill. App. Ct. 1983), cert. denied, 465 U.S. 1033 (1984); *People* v. *Sanders*, 361 N.E.2d 884, 886-887 (Ill. App. Ct. 1977). Therefore, under Illinois law, petitioner's first conviction for cannabis possession could not be relied upon for

a recidivism enhancement in connection with petitioner's second state possession offense.

b. In January 2006, petitioner returned to the United States from a trip abroad. Pet. App. 16a. In view of his prior convictions, petitioner was considered an arriving alien applying for admission to the country. See 8 U.S.C. 1101(a)(13)(C)(v), 1182(a)(2)(A)(i)(II). The government charged petitioner with being an "arriving alien" who is inadmissible to, and therefore removable from, the United States for having been convicted of violating a law relating to a controlled substance. A.R. 161-163.[2] The charging document cited both Illinois possession convictions. A.R. 163.

At a hearing before an immigration judge (IJ), petitioner was represented by counsel and conceded the allegations and charge of removability lodged against him. Pet. App. 16a; A.R. 96-98. Petitioner sought cancellation of removal for permanent residents under 8 U.S.C. 1229b(a). Pet. App. 16a. The IJ found petitioner removable as charged and also ineligible for cancellation of removal because he had been convicted of an aggravated felony based on his two state drug possession offenses. *Id.* at 17a-18a.

The Board of Immigration Appeals (Board) dismissed petitioner's administrative appeal. Pet. App. 7a-11a. The Board agreed with the IJ that a state possession conviction, occurring after a similar prior conviction had become final, qualified as an "aggravated felony"

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[2] Petitioner asserts incorrectly that he was charged with being removable under "8 U.S.C. 1227(a)(2)(A)(i)(II)." Pet. 4. In fact, petitioner was charged under 8 U.S.C. 1182(a)(2)(A)(i)(II), which pertains to aliens seeking admission to the United States, rather than to aliens already admitted. See A.R. 163 (charging petitioner under INA Section 212(a)(2)(A)(i)(II)).

under 8 U.S.C. 1101(a)(43)(B) because it is punishable as a felony under the federal Controlled Substances Act (CSA), 21 U.S.C. 844(a). Pet. App. 8a-10a.

3. Petitioner then sought judicial review. After this Court's decision in *Lopez* v. *Gonzales*, 549 U.S. 47 (2006), the court of appeals remanded the case to the Board for further consideration in light of that decision. Pet. App. 4a. On remand, the Board followed its recent precedential decision in *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382 (B.I.A. 2007), review denied, 570 F.3d 263 (5th Cir. 2009), petition for cert. pending, No. 09-60 (filed July 15, 2009). In *Carachuri-Rosendo*, the Board held that it would follow the law (if any) of the relevant circuit regarding when a recidivist possession conviction would be considered an aggravated felony. See Pet. App. 5a. The Board observed (*ibid.*) that, in *Carachuri-Rosendo*, it had identified the relevant Seventh Circuit law as *United States* v. *Pacheco-Diaz*, 506 F.3d 545 (2007), reh'g denied, 513 F.3d 776 (2008) (per curiam). In *Pacheco-Diaz*, the Seventh Circuit held in the criminal sentencing context, following *Lopez*, that a second or successive state drug conviction qualifies as an "aggravated felony" regardless "whether the defendant was charged in state court as a recidivist," because the second possession offense could have been punished as a felony "[h]ad [the defendant] been prosecuted under federal law." *United States* v. *Pacheco-Diaz*, 513 F.3d 776, 779 (7th Cir. 2008) (per curiam) (denying rehearing). Applying that decision, the Board concluded that petitioner's second controlled substance conviction was an aggravated felony barring him from cancellation of removal. Pet. App. 5a-6a.

Petitioner's second petition for review was summarily denied by the Seventh Circuit. Pet. App. 1a-2a.

The court of appeals relied (*id.* at 2a) on its recent decision in *Fernandez* v. *Mukasey*, 544 F.3d 862 (7th Cir. 2008), petition for cert. pending, No. 09-5386 (filed July 15, 2009), in which the court applied *Pacheco-Diaz* in the immigration context. See *id.* at 866-874.

DISCUSSION

Petitioner seeks review (Pet. 17-25) of the court of appeals' determination that his second conviction under Illinois law for drug possession qualifies as an "aggravated felony." The courts of appeals have divided on the question whether a second or subsequent state conviction for possession of a controlled substance automatically qualifies as an "aggravated felony" for purposes of 8 U.S.C. 1101(a)(43)(B), or instead qualifies only if the State applied a recidivist enhancement in that second or subsequent conviction. Compare *Carachuri-Rosendo* v. *Holder*, 570 F.3d 263, 266-268 (5th Cir. 2009), petition for cert. pending, No. 09-60 (filed July 15, 2009); and *Fernandez* v. *Mukasey*, 544 F.3d 862, 867-869 (7th Cir. 2008), petition for cert. pending, No. 09-5386 (filed July 15, 2009), with *Alsol* v. *Mukasey*, 548 F.3d 207, 217 (2d Cir. 2008); and *Rashid* v. *Mukasey*, 531 F.3d 438, 448 (6th Cir. 2008).

Petitioner urges the Court to grant the petition for a writ of certiorari in *Carachuri-Rosendo*, and to hold this petition pending the outcome of that case. Pet. 26. As stated in the brief for the respondent in *Carachuri-Rosendo*, the government agrees that review by this Court is warranted to resolve the conflict among the courts of appeals on the issue presented and that *Carachuri-Rosendo* is an appropriate case for the Court's resolution of the issue. See Resp. Br. at 14-18,

Carachuri-Rosendo v. *Holder*, No. 09-60 (filed Nov. 16, 2009).[3]

CONCLUSION

The Court should hold the petition for a writ of certiorari in this case pending its disposition of the petition for a writ of certiorari in *Carachuri-Rosendo* v. *Holder*, petition for cert. pending, No. 09-60 (filed July 15, 2008), and then dispose of this case accordingly.

Respectfully submitted.

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[3] We are serving petitioner with a copy of respondent's brief in *Carachuri-Rosendo*.